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100th Congress, 2d Session - - - - - - - - - - - House Report 100-991

LEGISLATION NEEDED TO CURB SECRECY CONTRACTS

FIFTY-NINTH REPORT

BY THE

COMMITTEE ON GOVERNMENT OPERATIONS

SEPTEMBER 28, 1988.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. BROOKS, from the Committee on Government Operations, submitted the following

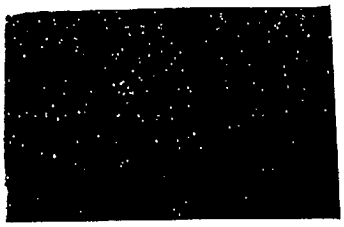
FIFTY-NINTH REPORT

BASED ON A STUDY BY THE LEGISLATION AND NATIONAL SECURITY SUBCOMMITTEE

On September 27, 1988, the Committee on Government Operations approved and adopted a report entitled "Legislation Needed to Curb Secrecy Contracts." The chairman was directed to transmit a copy to the Speaker of the House.

I. SUMMARY

On December 22, 1987, section 630 of Public Law 100-202 was signed into law by the President. This appropriations provision placed a moratorium on the use of certain nondisclosure agreements, or contracts, that the Administration is imposing on millions of Federal and Federal contractor employees having access to classified national security information. The agreements were promulgated as part of a new program to protect against the improper disclosure of such information. Since the inception of this program, in the early years of this Administration, Congress has been concerned about various specific requirements contained in these nondisclosure agreements, which go far beyond statutory prohibitions on the disclosure of classified information. While no one argues against the need to prevent leaks of classified information, criticisms have been made that the agreements impose additional requirements that violate the First Amendment by restricting the disclosure of nonclassified material and by imposing censorship through a prepublication review system. Further, the agreements interfere with communications to Congress in violation of statutes and the Constitution.



Over the course of several years, many committees of the Congress, including the House Government Operations Committee, have had extensive hearings examining this controversial policy. During this period, the program has grown immensely and now it is estimated that over three million individuals are covered. Section 630 was enacted to put a halt to the program while Congress could consider legislation to address these nondisclosure agreements.

The Administration, however, has not followed the law and, instead, in a lawsuit brought by several Members of Congress and others, sought to challenge its constitutionality on the ground that the President has exclusive power over national security and foreign policy information. In May of this year, a Federal District Court concurred with the Administration's view and declared Section 630 unconstitutional. That decision marked the first time in American history that a Federal court has overturned a Federal statute because it impinged upon Presidential authority over national security or foreign policy. The case has been appealed to the Supreme Court.

The Legislation and National Security Subcommittee held hearings to evaluate the basis for and impact of the Court's decision and to review once again the Administration's nondisclosure agreement policy.

Contrary to the District Court's decision, Congress does have specific authority under the Constitution to legislate in the areas of national security and foreign policy. The Constitution grants Congress the power to declare war, raise and support the Army and Navy, and approve treaties. Further, the Constitution places in Congress power over all appropriations, regardless of subject matter. The implications of the District Court's decision strike at the fundamental basis of our republic—shared responsibility between the Congress and the President for national policy. If allowed to stand, the decision could undermine our constitutional system. Further, Congress should enact permanent legislation to correct the constitutional and statutory infirmities in the nondisclosure agreement policy. As Congressman Frank Horton stated at the recent hearings, "Congress should shape policies that govern their [the nondisclosure agreements'] use and strike the needed balance between critical national security needs and constitutional guarantees."

II. Discussion

A. Background

1. The committee opposes the Administration's censorship initiatives in 1983

On November 15, 1983, the Committee on Government Operations (hereinafter, the committee) issued a report entitled "The Administration Initiatives To Expand Polygraph Use and Impose Lifelong Censorship on Thousands of Government Employees." [1]

[1] "The Administration's Initiatives To Expand Polygraph Use and Impose Life-long Censorship on Thousands of Government Employees," Twenty-fifth Report by the Committee on Gov

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The committee condemned two programs mandated by the President in his National Security Decision Directive 84,[2] issued in March of 1983, and urged that they be withdrawn.

The committee focused on the directive's requirement for greater use of polygraph tests and the imposition of prepublication review agreements to prevent leaks which may occur in publications and statements by former or current Federal employees.

The use of prepublication review agreements was only one portion of a larger requirement to use secrecy agreements on a vast scale. NSDD 84, paragraph 1(a), requires that "All persons with authorized access to classified information shall be required to sign a nondisclosure agreement as a condition of access," and paragraph 1(b) required that "All persons with authorized access to Sensitive Compartmented Information (SCI) shall be required to sign a nondisclosure agreement as a condition of access to SCI and other classified materials" that "must include a provision for prepublication review." [3] The prepublication review requirement was an extension of an existing prepublication review contract program already in existence at the Central Intelligence Agency (CIA) and the National Security Agency (NSA). According to testimony by the General Accounting Office (GAO) presented to the committee in 1983, there were approximately four million persons with access to classified information who would be required to sign a nondisclosure agreement and approximately 127,000 with access to SCI [4] who would be required to sign a prepublication review nondisclosure agreement.[5] Those figures did not include employees at the CIA and NSA.

Based upon testimony presented at public hearings held on October 19, 1983, before the Legislation and National Security Subcommittee,[6] the committee found that: "The prepublication review

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ernment Operations, House Report No. 98-578, U.S. Government Printing Office, Washington, 1983 (hereinafter referred to as Report).

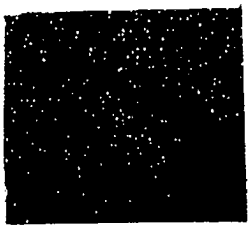
[2] National Security Decision Directive 84 on Safeguarding National Security Information, issued March 11, 1983 (hereinafter referred to as NSDD 84). NSDD 84 was the product of an interdepartmental report, which examined the problem of "media" leaks from the executive branch in which "there is no apparent involvement of a foreign power." Report by the Interdepartmental Group on Unauthorized Disclosures of Classified Information, March 31, 1982, p. A-1.

[3] NSDD 84, id., p. 1.

[4] Sensitive Compartmented Information (SCI) is one of many special access programs which are provided for under Executive Order 12356, National Security Information, April 2, 1982. Sec. 4.2 of that order provides, in part, "Agency heads . . . may create special access programs to control access, distribution, and protection of particularly sensitive information. . . ." According to a survey conducted by the GAO and reported to Congress on June 11, 1984, at the end of 1983 there were about 100 special access programs in addition to SCI. These are super classification programs that go beyond the "Top Secret," "Secret," and "Confidential" categories established under Executive Order 12356. Special rules governing them are fixed by the agency creating them and may exceed those in the President's Executive Order. SCI is controlled by the Director of the Central Intelligence Agency.

[5] "Review of the President's National Security Decision Directive 84 and the Proposed Department of Defense Directive on Polygraph Use." Hearing before a subcommittee of the Committee on Government Operations of the U. S. House of Representatives, 98th Congress, 1st Session, October 19, 1983, p. 10-11 (hereinafter referred to as NSDD 84 hearing).

[6] Id. With regard to the prepublication review agreements, the committee heard testimony from the General Accounting Office, the Justice Department, Professors Lee Bollinger of the University of Michigan Law School, and Lucas Powe of the University of Texas Law School, former Secretary of State George Ball, former Assistant Secretaries of State Charles William Maynes and Patricia Derian; Dennis Hays, President of the American Foreign Service Association; Ralph Davidson, Chairman of the Board of Time, Inc.; Bob Schieffer of CBS news, representing the Society of Professional Journalists, and many others representing the media and other interested groups.



agreements required by the President's directive constitute an unwarranted prior restraint in violation of the First Amendment," and that "the prepublication review requirement poses a serious threat to freedom of speech and national debate." [7] The committee, therefore recommended that section 1(b) requiring the prepublication review agreement be rescinded and, if not, that legislation should be enacted to prevent "the infringement on free speech and political debate the Administration's initiatives entail." [8]

That fall, the Congress passed a law, offered by Senator Charles McC. Mathias (R-Maryland) as an amendment to the State Department authorization bill for fiscal year 1984, that prevented the Administration from proceeding until April 15, 1984, with—

> Any rule, regulation, directive, policy decision or order which (1) would require any officer or employee to submit, after termination of employment with the government, his or her writings for prepublication review by any officer or employee of the Government, and (2) is different from the rules, regulations, directives, policies, decisions, or orders (relating to prepublication review of such writings) in effect on March 1, 1983 [the issuance of NSDD 84].[9]

That measure, signed into law by the President on November 22, 1983,[10] imposed a moratorium on the implementation of the prepublication review requirement in NSDD 84 to provide Congress with time to consider legislation regarding the Administration's censorship programs.

2. The President ostensibly withdraws the prepublication review requirement

At the beginning of the second session of the 98th Congress, several months after the committee issued its report on NSDD 84, Chairman Brooks introduced legislation to restrict the use of polygraph examination and outlaw the use of prepublication review requirements.[11]

Hearings on the bill were held on February 27, 1984, before the Subcommittee on Civil Service. On March 20, one day before its consideration by the full Committee on Post Office and Civil Service, the President's then National Security Advisor Robert C. McFarlane wrote Chairwoman Patricia Schroeder of the Civil Service Subcommittee indicating that, "the President has authorized me to inform you that the Administration will not reinstate these two provisions [polygraph and prepublication review] of NSDD 84 for the duration of this session of Congress" and that "the Administration will notify your subcommittee of any intended action at least 90 calendar days prior to this effective date." [12] Based upon the President's apparent decision to abandon, at least temporarily, the polygraph and prepublication review policies of NSDD 84,

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[7] Report, supra, n. 1, p. 20–21.
[8] Id., p. 21.
[9] See Congressional Record, October 20, 1983, pp. S–14782–14300.
[10] Public Law 98–164, Section 1010.
[11] H.R. 4681, the Federal Polygraph Limitation and Anti-Censorship Act of 1984, was introduced by Chairman Brooks (D-Texas) on January 30, 1984. The bill was referred to the Committee on Post Office and Civil Service.
[12] Letter of Robert C. McFarlane to Patricia Schroeder, March 20, 1984.

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Chairman Brooks' legislation was taken off the schedule by the Post Office and Civil Service Committee. It appeared as if there would be no need for legislation prohibiting prepublication review contracts because the Administration had decided not to implement that policy.

Unfortunately, as it was to be learned later, the President's withdrawal of the prepublication review requirement of NSDD 84 (Section 1(b)) did not amount to a withdrawal of the prepublication review policy itself. To date, the prepublication review requirement of NSDD 84 remains suspended, yet all executive branch employees with access to SCI have been, and are being, required to sign prepublication review agreements. That policy has already been put into effect by the Administration without Presidential authorization pror to the issuance of NSDD 84. In a series of follow-up letters [13] between Chairwoman Schroeder and Mr. McFarlane in 1984, it was revealed that the Administration had promulgated a prepublication review agreement labeled Form 4193 in December 1981 for signature by everyone with access to SCI. Under direction of NSDD 84 issued in the spring of 1983, the Justice Department had developed technical changes to that contract and the Administration had intended to issue the revised version as a new Form 4193. Suspension of paragraph 1(b) by the Administration meant that the Administration simply intended not to proceed with the revised contract; instead, they continued imposing the original Form 4193 on all those with SCI access.

Thus, in a survey conducted by the General Accounting Office in 1986, it was determined that as of the end of 1985, at least 240,776 individuals had signed SCI nondisclosure agreements with prepublication review requirements [14] and in an updated survey they conducted for their testimony before the subcommittee this year, they estimated that about 450,000 current and former employees have now signed such SCI agreements. [15] Both surveys did not include employees or former employees of the Central Intelligence agency or the National Security Agency.

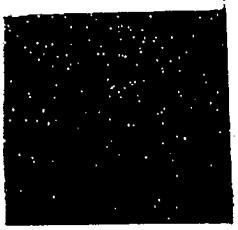
3. Secrecy contracts come to the fore of Congress's attention again

Implementation of NSDD 84's requirement that all employees and Federal contractor employees with access to classified information sign a nondisclosure agreement (Section 1 (a)) had begun on a massive scale by the summer of 1987. Pursuant to NSDD 84, the Director of Information Security and Oversight Office (ISOO), in conjunction with the Justice Department, developed a standardized contract labeled SF 189 that was required to be signed by all Federal employees with access to classified information (SF 1989-A was developed for employees of Federal contractors with such access). Soon many Members of Congress were hearing complaints by employees regarding the imposition of these nondisclosure contracts. On August 17, the National Federation of Federal Employees filed

[13] Letter of Chairwoman Patricia Schroeder to Mr. Robert McFarlane, March 21, 1984; letter of Robert McFarlane to Chairwoman Schroeder, April 21, 1984.

[14] Information and Personnel Security: Data on Employees Affected by Federal Security Programs," GAO/NSIAD-86-89FS, September 1986.

[15] Written Testimony of Louis Rodriques, Associate Director, National Security and International Affairs Division, General Accounting Office, p. 4. Hearing, infra, n. 29.



a lawsuit challenging the nondiscolsure agreements on constitutional and statutory grounds. And, on September 1, the American Federation of Government Employees brought a similar action. At the request of Representative John Dingell, chairman of the House Committee on Energy and Commerce, and Representative William Ford, chairman of the Committee on Post Office and Civil Service, the Subcommittee on Human Resources of the House Committee on Post Office and Civil Service held hearings on nondisclosure agreements on October 15, 1987.[16]

In addition to the prepublication review requirements, concerns were raised over the contracts'—both SF 4193 and 189—explicit application to "classification" as well as classified information and their impact on employees' communication with Congress. Testimony was presented that indicated these contracts violate statutory protections for Federal whistleblowers and emloyees such as those in the Civil Service Reform Act and the Lloyd-LaFollette Act and that they impremissibly restrict free speech in violation of the First Amendment.

At the hearings, Senator Charles Grassley (R-Iowa) likened the nondisclosure agreement program to an effort to "gag public servants" and "place a blanket of silence over all information generated by the government." He "urged all Federal employees to refrain from signing SF 189." [17]

Shortly thereafter, Congress passed a year-long moratorium—Section 630 of Public Law 100–202—on the use of SF 189, 4193, and other such nondisclosure agreements, which was signed into law by the President in late December 1987.[18]

In passing the moratorium. Congress noted:

> The purposes of this amendment is to address serious concerns of the Congress about the obligations imposed on government employees by nondisclosure agreements which

[16] Classified Information Nondisclosure Agreements, hearing before the Subcommittee on Human Resources of the Committee on Post Office and Civil Service, U.S. House of Representatives, October 15, 1987 (hereinafter referred to as the Sikorski hearings). An opening statement was made by Chairman Sikorski and testimony as presented by: Hon. Charles Grassley, U.S. Senator from Iowa; Hon. Jack Brooks, Member of Congress from Texas; Hon. Barbara Boxer, Member of Congress from California; Ernest Fitzgerald, Deputy, Management Systems, Office of Financial Management, U.S. Air Force; Louis Brase, Cryptological Maintenance Training Manager, U.S. Air Force; Steven Garfinkel, Director, Information Security Oversight Office; Kathleen Buck, General Counsel, U.S. Air Force; James Peirce, President National Federation of Federal Employees; Charles Hobbie, Deputy General Counsel, American Federation of Government Employees; and Tom Devine, Director, Government Accountability Project.

[17] Ed. at p. 8.

[18] Public Law 100–202, Section 630. This provision states:

"No funds appropriated in this resolution or any other Act for fiscal year 1988 may be used to implement or enforce the agreements in Standard Forms 189 and 4193 of the Government or any other nondisclosure policy, form or agreement if such policy, form or agreement:

"(1) concerns information other than that specifically marked as classified; or, unmarked but known by the employee to be classified; or, unclassified but known by the employee to be in the process of a classification determiantion;

"(2) contains the term 'classifiable';

"(3) directly or indirectly obstructs, by requirement of prior written authorization, limitation of authorized disclosure, or otherwise, the rights of any individual to petition or communicate with Members of Congress in a secure manner as provided by the rules and procedures of the Congress;

"(4) interferes with the right of the Congress to obtain executive branch information in a secure manner as provided by the rules and procedures of the Congress;

"(5) imposes any obligations or invokes any remedies inconsistent with statutory law.

"*Provided*, That nothing in this section shall affect the enforcement of those aspects of such nondisclosure policy, form or agreement that do not fall within subsections (1)–(5) of this section."

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they are required to sign as a condition for access to classified information. These agreements, which are imposed by the executive branch without any explicit statutory authority, create obligations for these employees to safeguard not only information which is properly classified pursuant to executive order, but any information which may be considered to be "classifiable." This overbroad and ambigous language results in a chilling effect on the first amendment rights of government employees, including their ability to communicate directly with members of Congress.

The amendment identifies several of these concerns and would bar the enforcement of such questionable obligations during fiscal year 1988. This effort to address the dubious concept of "classifiable" information does not cover the complete range of Congress's concerns regarding nondisclosure agreements. For example, over the past five years, prepublication review provisions, which are included in some nondisclosure agreements, have been extremely controversial and criticized widely by legal scholars, former government officials, and the press. It is the intent of the authors of this amendment, during the coming year, to examine the entire issue of nondisclosure agreements, including prepublication review, and make appropriate responses to executive branch policy in this area as needed.[19]

Chairman Brooks noted on the floor of the House prior to final passage of the moratorium that the measure "expressly prohibits the use of funds for the continued implementation of standard forms 189 and 4193 and any other similar contracts or policies," and that "no one will be required to sign these contracts in the coming fiscal year."[20]

4. The Administration does not comply with the law

In response to the newly enacted moratorium on nondisclosure agreements, the Director of ISOO directed agencies on December 29, 1987, to cease requiring employees to sign SF 189 and SF 189-A.[21] Nevertheless, the GAO reported to the subcommittees that 18 agencies have collected 43,000 newly signed SF 189 contracts after enactment of the law in the first 3 months of this year.[22]

The Director of ISOO has subsequently anounced that the SF 189 contracts executed after enactment of the moratorium may be voided upon request by the employees.[23] Such actions were not in compliance with the law; the moratorium did not create an option for agencies to collect signatures on the contracts from employees that are agreeable to signing them.

Actions taken by the Administration with regard to SF 4193 reveal even greater noncompliance. The Director of the Central In-

[19] "Conference Report to accompany H.J. Res. 396." 100th Congress, 1st Session, United States House of Representatives, Rept. No. 100-398 (December 22, 1987), page 1179.
[20] Congressional Record, December 21, 1987, page H11999.
[21] Letter of Steven Garfinkel to agency officials, December 29, 1987.
[22] Written testimony of Louis Rodrigues, supra, n. 15, p. 6.
[23] Letter of Steven Garfinkel to agency officials, dated January 17, 1988.

telligence Agency instructed the agencies to continue collecting signatures on SF 4193 and other versions of the SCI republication review contract despite the explicit injunction against its implementation in the law. The agencies were directed to attach an addedum to newly executed SF 4293's that reads as follows:

> The obligations imposed by this Agreement shall be implemented and enforced in a manner consistent with the section entitled "Employee Disclosure Agreements" contained in Public Law 100-202, Continuing Appropriations for Fiscal Year 1988, 22 December 1987, and other applicable law.[24]

The GAO reported in its testimony to the subcommitte that as of March 31 of this year, 6,000 SCI nondisclosure agreements have been signed after the enactment of the law.[25] The moratorium, however, prohibited any further implementation of SF 4193. Proceeding with the program by continuing to collect signatures on SF 4193's is a flagrant violation of the law.

Consequently, Senators Grassley, Proxmire, Pryor and Representatives Brooks, Boxer, Schroeder, and Sikorski joined with the American Foreign Service Association in a Federal lawsuit to compel the Administration's compliance with the moratorium.[26] They asked the court to enjoin the Administration from requiring employees to sign the prohibited nondisclosure agreements during the remainder of this fiscal year and to void all those contracts signed after enactment of the law.

On May 27, 1988, the court issued a memorandum opinion in this suit, noting that the charge that the Administration was not complying with the law is "well-founded." [27] In sweeping language, however, the court overturned the statute under the constitutional doctrine of separation of powers, stating that "(t)he statute impermissibly restricts the President's power to fulfill obligations imposed upon him by his express constitutional powers and the role of the Executive in foreign relations." [28] The court did not cite any precedcents in which a Federal statute had been overturned by the courts because it impinged upon the Executive's constitutional role in foreign relations. The subcommittee held hearings on August 20 to review the Administration's continuing use of nondisclosure agreements and to evaluate the basis of the court's ruling and its effect on Congress's legislative and oversight powers.[29] The court's decision is presently in appeal to the Supreme Court, and the statutory moritorium has been extended for another year.[30]

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[24] Declaration of Lieutenant General Edward J. Heinz, Feb. 9, 1988.

[25] Written testimony of Louis Rodrigues, supra n. 15.

[26] *American Foreign Service Association* v. *Garfinkel*, 688 F. Supp. 671 (D.D.C., May 27, 1988). (Hereinafter referred to as AFSA.)

[27] Id., at p. 22, n. 16.

[28] Id., at p. 27.

[29] "Congress and the Administration's Secrecy Pledges." hearings before the Legislative and National Security Subcommittee of the Committee on Government Operations, August 10, 1988 (hereinafter referred to as the hearings).

[30] On September 22, 1988, the President signed into law section 619 of Public Law 100-440, which extends the moritorium on funding for the use of nondisclosure agreements for another year.

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B. THE NONDISCLOSURE AGREEMENTS VIOLATE CONSTITUTIONAL AND STATUTORY STANDARDS

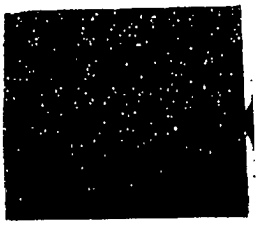
The Administration's nondisclosure agreements severely restrict free speech in matters of national political debate and strike at the core of the First Amendment. Further, they violate various statutory provisions that have been enacted to protect Federal employees and citizens in their communications with Congress. Through the many congressional oversight and legislative hearings before Congress on this issue since the issuance of NSDD 84 in 1983, the nondisclosure agreements have been criticized in many regards. Three primary problems with the nondisclosure agreements have emerged. SF 189 and SF 4193 both prohibit the disclosure of "classifiable" as well as classified information. This vague restriction goes well beyond the President's Executive Order on national security information [31] and impermissibly chills the disclosure of nonclassified material. Secondly, SF 189 and SF 4193 both restrict disclosures of information to Congress in violation of the Civil Service Reform Act and the Lloyd-LaFollette Act that permit and protect the disclosure of information to the Congress. In addition to these infirmities, the SCI nondisclosure agreement contains an explicit life-long prepublication review, or censorship, requirement which institutionalizes a governmental prior restraint system in direct violation of the First Amendment.

1. Restrictions on disclosures of "classifiable" information

The Administration's nondisclosure agreements—both for those with classified and with SCI access—establish a new, uniquely vague, and broad prohibition on the disclosure of information by Federal employees. Under the terms of the agreements, a signatory may not reveal information that is "classifiable." [32] Covering "classifiable" information under the scope of the nondisclosure agreements places a tremendous chill on the First Amendment rights of millions of people. On its fact, those who sign the agreements are prohibited from disclosing any information that may conceivably fit the criteria for classification under the President's Executive Order on national security information. Those standards are so broad as to be virtually meaningless. They include information that concerns "military plans, weapons or operations; the vulnerability or capabilities of systems, installations, projects, or plans relating to national security; foreign government information; * * * foreign relations or foreign activities of the United States; scientific, technological, or economical matters relating to national security. * * *" and "other categories of information that are related to national security. * * *" [33]

Information that falls into these categories could be classified, and, hence, is classifiable. Employees who have signed the nondis-

[31] Executive Order 12356, supra, n. 4.
[32] Previously "classifiable" has been a limiting term used by the courts to denote that classified information in fact properly deserved that status. *Knopf* v. *Colby*, 509 F. 2d 1362, 1367 (4th Cir. 1975), cert. denied 421 U.S. 992 (1975); *cf. McGehee* v. *Casey*, 718 F. 2d. 1137 (D.C. Cir. 1983). by contrast, "classifiable" in the nondisclosure agreements is clearly an expansive term, introduced by the Executive to describe unclassified information subject to the same prohibitions on disclosure as that which is properly classified.
[33] Executive Order 12356, supra, n.4, Section 1.3.



closure agreements are left with little guidance to decide if particular information may be covered by the nondisclosure agreements. Senator Grassley, condemning the vagueness of the classifiable standard, succinctly explained the employees' situation:

> How does one know when something is classified? The answer is that it is marked "classified." How does one know when something is classifiable? The answer is that one cannot know. The term is so broad and undefinable that it could supplant the term "loitering" as a textbook example of vagueness for first year law school classes.[34]

Faced with congressional criticism, the Administration has attempted to narrow the scope of information covered under the term "classifiable" by adopting continually changing definitions of the term in the Federal Register.[35] These definitions are inadequate because they still cover unmarked, unclassified information for which the employee has no prior notice that it is subject to the restrictions on disclosure.[36] Furthermore, no definitions have been incorporated into the nondisclosure agreements themselves and the chilling effect of the term "classifiable" remains.

As Congressman Horton indicated at the hearings this year, "I believe strongly that agreements binding government employees to nondisclosure of information and Government control of their writing should be restricted to classified information only." [37] It is imperative that the term "classifiable" be deleted from all the nondisclosure agreements, and that their scope be limited to actually classified information.

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[34] 87 Sikorski hearings, supra, n.16, p.9

[35] ISOO's varying definitions fall into two approaches. The first, published in a series of August 1987 notices, creates liability for disclosing information that could have been marked classified but was not "as a result of negligence, time constraints, error, lack of opportunity or oversight." 52 Fed. Reg. 28802 (Aug. 3, 1987); 52 Fed. Reg. 29793 (Aug. 11, 1987). The essence of the first approach was to create a double standard of liability. It held the would-be whistleblowers responsible for not correcting the Government's mistakes or negligence.

After several months of discussion, ISOO's second approach was formalized on December 21, 1987, the day before final passage of Section 630. The most recent definition shifts to a different standard of liability. In the absence of objective notice, the employee now is responsible for unmarked unclassified information that he or she "should have known" was classified or "in the process of classification determination." 52 Fed. Reg. 48367 (Dec. 21, 1987).

[36] The Administration's most recent attempt to define "classifiable" holds employees liable for disclosures of unclassified information, without any prior notice to them of its special status. Under Executive Order 12356, classified information is marked as such. Sec. 1.5. Even information that is in the process of a classification determination is given an interim classification marking for a 30-day period. Executive Order 12356, Sections 1.1(c), 1.2(e). The employee is, therefore, aware of its special status. Without the classification markings on unclassified information, however, an employee cannot be sure that the nondisclosure agreements' restrictions apply to that material. Consequently, they must check with their superiors, thereby alerting them to the disclosure. That invites a chilling effect. As Congresswoman Boxer noted at the hearings, "I am concerned this will force would-be whistleblowers to have to ask their superiors about classification determinations. This would act to stop the whistleblower." (Written testimony of Hon. Barbara Boxer, at p. 6.)

Senator Grassley explained further, "If the employee is not certain if information might some day be classified, he or she must ask a supervisor. As a result, the potential whistleblower would be identified [incurring risk of retaliation], and the supervisor could block disclosure of the information, even if it was not classified and had never intended to be classified, but was simply embarrassing to the Administration." (Written testimony of Hon. Charles Grassley at p. 6-7.

The Supervisor merely has to respond to the inquiry about a document's status by starting a classification determination about the questioned information.

[37] Hearings, supra, n. 29 (opening statement of Hon. Frank Horton).

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2. Disclosures to Congress

The agreements prohibit the disclosure of information to individuals that are not "authorized" to receive it. SF 189 prohibits the disclosure of information unless the signatory has "officially verified that the recipient has been properly authorized by the United States Government to receive it." The Administration has contended that this restriction applies to disclosures of information to Congress as well as the public. According to Steven Garfinkel, the Director of ISOO, "[N]o Member of Congress is inherently authorized to receive all classified information from the Executive Branch." [38] In other words, the executive branch determines which Members of Congress are authorized to receive what information.[39]

This requirement directly violates the constitutional right to petition Congress [40] and several statutes enacted to permit employees to disclose information to Congress. In 1912, the Lloyd-Lafollette Act was adopted in response to a "gag order" that has been issued by President Taft forbidding Federal employees from communicating with Congress, except through and with the consent of department heads.[41] A lead sponsor of the legislation, Representative Lloyd, characterized the gag rule of the executive as "Un-American, unjust" and continued that "[i]t may fit into the scheme of things in a country like Russia, but it is entirely antagonistic to the spirit of our institutions. It is a slap at the Constitution and an affront to our citizens." [42]

The Lloyd-Lafollette Act provides:

> The right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish *any* information to either House of Congress, or to a committee or member thereof may be not interfered with or denied. [Emphasis added.] [43]

In remarks made by Representative Stone during the passage of the Lloyd-LaFollette Act, the implications of "gag orders" for a free and democratic republic were made clear:

> How can a conscientious Member of Congress vote intelligently and for the best interests of the American people if the most reliable sources of information are closed to him? I am glad that this rule is to be abrogated, not only because of my sympathy for these men, who have been unreasonably restrained in their rights as citizens, but I am glad because hereafter I shall be free to seek and secure

[38] Written responses by Steven Garfinkel to questions by Chairman Sikorski, January 13, 1988.
[39] According to the Administration, authorization is granted if three conditions are met: First, the individual must have a security clearance; second, the individual must have signed SF 189, or an alternative approved nondisclosure agreement; and third, the individual must have a "need-to-know" the information for an official authorized purpose. Being "authorized" for access is a function of these three requirements, of which being "cleared" for access is only one." Although the Administration says security clearances and nondisclosure agreements are not necessary for Members of Congress, in practice, they have often required Members of Congress to fulfill these requirements and they apply the "need-to-know" test as a matter of policy for all Members of Congress. Id., at 13.
[40] U.S.C. Constitution, Amendment I.
[41] Executive Order of November 19, 1909, reprinted in 48 Cong. Rec. 5723 (1912).
[42] Congressional Record 10671 (1912), (remarks of Rep. Lloyd).
[43] 5 USC section 7211.

> information that will enable me the better to discharge my duties as a Representative.[44]

The nondisclosure agreements of the Administration impose a "gag order" very similar to that which Congress rejected in 1912. Employees are required to verify from their agencies that a Member of Congress is "authorized" to receive information they wish to disclose. Such a requirement is plainly inconsistent with the Lloyd-LaFollette Act.

The nondisclosure agreements also run afoul of the whistleblower protection provisions of the Civil Service Reform Act. That law prohibits the agencies from taking reprisals against employees that make disclosures of information evidencing illegal, improper, or wasteful Government activities.[45] Under the law, national security information cannot be disclosed to the public under the whistleblower protections, but only to appropriate Government officials.[46] The Act, however, indicates that it is "not to be construed to authorize * * * the taking of any personnel action against an employee who disclosed information to Congress.[47] It is clear that all disclosures to Congress are protected:

> The provision is intended to make clear that by placing limitations on the kinds of information any employee may publicly disclose without suffering reprisal, there is no intent to limit the information an employee may provide to Congress or to authorize reprisal against an employee for providing information to Congress. * * * Neither title I nor any other provisions of the Act should be construed as limiting in any way the rights of employees to communicate with or testify before Congress.[48]

The nondisclosure agreements, however, can subject employees to sanctions for disclosures to Congress specifically protected by the whistleblower provisions of the Civil Service Reform Act.

In restricting disclosures to the Congress, these agreements contravene statutory protections Congress has enacted to secure its access to information. According to Congressman Horton, "access by individuals wishing to disclose information to Members of Congress should not be restricted, as long as contact conforms to established rules of the House and Senate." [49] As noted by Senator Grassley before the subcommittee, the nondisclosure agreements are "a barrier to the free flow of vital information to Congress" and "[U]nless Congress acts to alter the Administration's course, we're simply paving the road to a secret government." [50]

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[44] Appendix to 48 Cong. Rec. 140 (1912), (remarks of Rep. Stone).
[45] 5 USC 2302(b)(8).
[46] 5 USC 2308(b)(8)(B).
[47] 5 USC 1202(b).
[48] Civil Service Reform Act, H.R. Rept. No. 1717 (Conference Report), 95th Cong., 2d Sess. 132 (1978).
[49] Hearings, supra, n. 29 (opening statement of Hon. Frank Horton.
[50] Hearings, (written testimony of Senator Grassley, p. 2).

3. Prepublication review

The Administration's SCI nondisclosure agreements [51] require the employee to agree "to submit for security review by the Department or Agency that last authorized my access to such information [SCI], all information or materials, including works of fiction, which contain or purport to contain any SCI or description of actitivies that produce or relate to SCI or that I have reason to believe are derived from SCI, that I contemplate disclosing to any person not authorized to have access to SCI or that I have prepared for public disclosure." [52] The agreement goes on to state, "I understand and agree that my obligation to submit such information and materials for review applies during the course of my access to SCI and thereafter, and I agree to make any required submissions prior to discussing the information or materials with, or showing them to any person not authorized to have access to SCI." [53] This lifelong prepublication review requirement has been severely criticized as a direct affront to the First Amendment and the Government Operations Committee has previously concluded that it "poses a serious threat to freedom of speech and national public debate." [54]

In testimony in 1983 before the subcommittee on NSDD 84, three noted First Amendment scholars—Professors Thomas Emerson of Yale University Law School, Lee Bollinger of the University of Michigan Law School, and Lucas Powe of the University of Texas Law School—all expressed their view that the prepublication review requirement in the SCI nondisclosure agreement is an unconstitutional violation of the First Amendment. They reached this conclusion despite recent precedent in *Snepp* v. *United States,* 444 U.S. 507 (1980) where the Supreme Court upheld the validity of a prepublication review agreement signed by a CIA agent.

In the opinion of all three, the prepublication review requirement constitutes, in legal parlance, a "prior restraint or licensing system" and concluded that there is no question but that the framers intended the First Amendment to guard against such prior censorship programs.[55] Many others, including former officials and

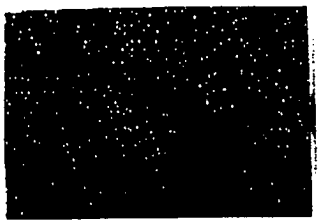
[51] In 1981, the Administration promulgated SF 4193 as its SCI nondisclosure agreement. After the issuance of NSDD 84 by the President in 1983, the Justice Department developed a revised version of SF 4193 that was to be substituted for the 1981 version. This new version was never implemented, however, because the Administration withdrew the prepublication review requirement of NSDD 84. See n. 13 and accompanying text. The 1981 version of SF 4193 continued to be required of all those with SCI access (defense contracts signed by department employees are labeled DD1847-1) until March 1988 when Form 4355 was promulgated as a new version of the SCI contract.

[52] SF 4193, paragraph 4.

[53] Id.

[54] Report, supra, n. 1, p. 20.

[55] "The essence of Directive 84 is to impose a sweeping prior restraint * * * it sets up a classic and virulent scheme of censorship. As Chief Justice Burger has said, 'prior restraints are the most serious and least tolerable infringements on First Amendments rights.'" (written statement of Thomas Emerson, Report *supra,* n. 1, p. 16). "It [the prepublication review requirement] also attacks the First Amendment at the one place where there is *no* debate at all about what the Framers intended: Prior censorship should be unconstitutional. If government had the ability to punish individuals for what they said, the Framers believed that that power could only be brought into play after the speech occurred. Licensing was totally forbidden." [Emphasis added.] (*Id.,* (Testimony of Lucas Powe). "For more than six decades now, the courts of this country have struggled with the task of defining a workable set of concepts and principles for the first amendment. Throughout this time, however, a virtual consensus has formed around one basic idea—and that is that prior restraints are the least favored, the most distrusted, method of proceeding against harmful speech activity. Licensing, or prior restraint, it has been repeatedly noted in the literature and cases, is the one matter, perhaps the only matter, we can be confident that the Framers intended to prohibit by the Free Speech Clause." (Testimony of Lee Bollinger, *Id.*)



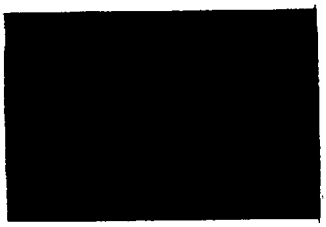
representatives of the press, argued strenuously against the prepublication review requirement in NSDD 84.[56]

Their views were echoed by former Senator Mathias and Professor Michael Glennon in their testimony before the subcommittee this year. Senator Mathias indicated that "[p]rior restraint on the printing, circulation or publication of works in writing is inimical to that free exchange in ideas that is vital to the American constitutional system."[57] Professor Michael Glennon of the Law School of the University of California at Davis, described the prepublication review requirements as a "pall of government censorship" which has "descended upon vast numbers of persons who are among the most expert on key matters of public concerns."[58]

In 1983, the committee concluded that the prepublication review policy of NSDD 84 represented a system of "unwarranted prior restraint in violation of the First Amendment" and recommended that it be rescinded.[59] Of particular force was testimony by the General Accounting Office that only two leaks of SCI through writings and speeches of current or former employees had occurred in the preceding 5 years, but that the SCI contracts were to be imposed upon 127,750 Federal employees and contractor employees to combat such leaks.[60] It was clear that there was no need for the Government to impose a massive censorship program.

At the hearing before the subcommittee this year, the GAO estimated that by the end of 1987, about 453,000 current and former employees had signed SCI prepublication review contracts. The GAO reported there were three unauthorized disclosures made in published writings or speeches of employees in 1987.[61] In discussing the Administration's expansion of the prepublication review nondisclosure program beyond the CIA and NSA, Admiral Stansfield Turner, a former Director of Central Intelligence, testified before the subcommittee that "I believe that unless there is a compelling case for secrecy, we should always come down on the side of openness. There are exceptions, but so many of the 'secrets' in the average agency of our government are not secret at all, that I come down on the side of no prepublication review outside the CIA and NSA."[62] When queried about the importance of such nondisclosure contracts to our national security, he responded that they are "not critical" and that "[O]ther than in the CIA and NSA, we have got along well for a long time without then."[63]

The Administration has not justified its creation of a massive censorship program. Our republic has survived a civil war and two world wars without resort to such programs. We should not be imposing censorship contracts on hundreds of thousands of Government officials now. Congress needs to pass legislation prohibiting this dangerous scheme.



[56] Report, supra, n. 1, pp. 18–20.
[57] Hearing, supra, n. 29, written testimony of Senator Charles McC.Mathias, Jr., p. 1.
[58] Hearing, supra, n. 29, Testimony of Michael Glennon, p. 20.
[59] Report, supra, n.1.
[60] Id., p. 15.

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C. CONGRESS HAS THE CONSTITUTIONAL AUTHORITY TO LEGISLATE RESTRICTIONS ON NONDISCLOSURE AGREEMENTS

The District Court's decision this past May overturning the statutory moratorium on the Administration's nondisclosure agreements is unsupported by legal precedent and deviates from the judicial analysis applied by the Supreme Court in cases involving the separation of powers doctrine. It is the first instance in American history that a Federal court has overturned a national statute on the theory that the President has exclusive control over a foreign policy or national security matter.

Professor Michael Glennon of the Law School of the University of California at Davis, a noted expert on the constitutional doctrine of separation of powers, indicated at the hearings before the Legislation and National Security Subcommittee that the court's decision "is the only decision in America case law in which a court has invalidated an Act of Congress on the basis of a general Presidential foreign affairs power" and "is the only decision in American case law in which a court has invalidated an exercise of Congress's power over the purse as an unconstitutional encroachment on executive power."[64] Further, he stated that the "decision of the District Court is not simply without precedent; the decision is an ill-considered and radical exercise of judicial activism" that "disregards time-honored doctrines of Anglo-American jurisprudence."[65]

Professor Harold Bruff of the University of Texas School of Law and coauthor of "The Law of Presidential Power" concluded in his testimony that the District Court should be "reversed by the Supreme Court" and that "the Court's approach was oversimplified throughout."[66]

Both professors noted that the District Court failed to apply the proper judicial analysis in reaching its decision and that Congress clearly has the authority under the Constitution to legislate regarding foreign policy or national security issues. Professor Glennon emphasized that, in large measure, Congress's power over appropriations was fixed in the Constitution by the Framers for that very purpose.[67]

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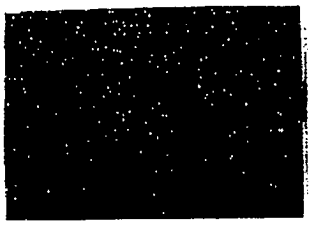
[64] Hearing, supra, n. 29, written testimony of Michael Glennon, p. 2-3.
[65] Id., at pp. 1 and 3.
[66] Hearing supra, n. 29, written testimony of Harold Bruff, p. 3.
[67] "The provision [appropriations clause of the Constitution] was framed against the backdrop of 150 years of struggle between the King and Parliament for control over the purse, often centering on military matters. In 1624 the House of Commons for the first time conditioned a grant of funds to the king. The Subsidy Act of that year prohibited the use of any military monies except for financing the navy, aiding the Dutch, and defending England and Ireland. Two years later Charles I attempted to wage war without popular support, but Parliament promptly denied him funds to conduct it.

"By the 1670's parliamentary control over the purse was firmly established. Charles II insisted that the stationing of troops in Flanders was the prerogative of the Crown. Parliament, however, saw it differently: it enacted the Supply Act of 1678, requiring that funds granted be used to disband the Flanders forces.

"Meeting in Philadelphia in 1787, the Framers were well aware of the tradition of parliamentary power over the purse and its use to check unwanted 'national security' activities. 'The purse and the sword must not be in the same hands,' George Mason said. Madison considered it 'particularly dangerous to give the keys of the treasury, and the command of the army, into the same hands.' He regarded the power over the purse as 'the most complete and effectual weapon with which any Constitution can arm the immediate representatives of the people. * * *' Accordingly, the Framers chose, in the words of Jefferson, to transfer the war power 'from the executive to the legislative body, from those who are to spend to those who are to pay.'" Hearings, supra, n. 29, written testimony of Michael Glennon, p. 17-18 (footnotes omitted).

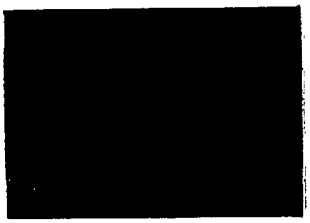


1. Judicial Analysis under the Separation of Powers Doctrine

The seminal Supreme Court case in the constitutional doctrine of separation of powers regarding Congress and the President is *Youngstown Sheet & Tube Co.* v. *Sawyer.*[68] In that suit, the Supreme Court held that President Truman's seizure of the steel mills during the Korean War (a nationwide workers strike had begun) was unconstitutional because it was not authorized by Congress. In fact, Congress had rejected a bill to authorize the President to make such seizures. Professor Bruff indicated that the "modern judicial approach to delineating the respective powers of the President and Congress stems from *Youngstown Sheet & Tube Co.* v. *Sawyer*"[69] and Professor Glennon cities the case as specifying "the mode of analysis pursued by the United States Supreme Court in assessing the reach of presidential foreign affairs power.[70] The District Court, however, did not acknowledge *Youngstown* in its opinion overturning the legal moratorium on nondisclosure agreements.

Justice Jackson wrote in his famous concurring opinion in the *Youngstown* case that "[P]residential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."[71] He then outlined three separate scenarios for evaluating separation of power cases regarding Congress and the President—situations in which the President's actions are supported by express or implied authorization by the Congress, situations when Presidential actions are neither authorized nor forbidden by Congress, and situations when Presidential actions are taken in violation of congressional dictates. Constitutional anaylsis varies for each situation and they present different "legal consequences.[72] According to Justice Jackson:

> 1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth), to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.
>
> 2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may



[68] 343 U.S. 579 (1952).
[69] Hearings, supra n. 29, written testimony of Harold Bruff, p. 5.
[70] Hearings, supra n. 29, written testimony of Michael Glennon, p. 10–11.
[71] Youngstown, supra, n. 68 at 635.
[72] Id.

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Bruff, p. 5.
Glennon, p. 10–11.

> sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.
>
> 3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.[73]

In the *Youngstown* case, Justice Jackson believed that the President's actions fell into his third category and he agreed with the majority of the Court in holding against the President's seizure of the mills.

More recently, in 1981, Chief Justice Rehnquist wrote in *Dames & Moore* v. *Regan* that Jackson's opinion in the *Youngstown* case "brings together as much combination of analysis and commonsense as there is in this area." [74] Writing for the majority, Rehnquist applied Jackson's analysis in that case to determine if President Carter's Iranian hostage settlement agreement was constitutional.

The Administration's actions in continuing to implement its nondisclosure contracts in the face of the legal moratorium are clearly within Jackson's third category and the President's power is at its "lowest ebb." [75] In the *AFSA* case, however, the District Court did not apply Jackson's analysis in reaching its decision. As Professor Glennon noted, the District Court relied exclusively on cases for precedent that fit into Jackson's first and second categories—they are therefore "irrelevant" [76] to the *AFSA* case. Contrary to Jackson's view, the Court analyzed this case as if Presidential powers are "fixed" [77] and as if the President has almost total constitutional control over foreign policy and national security.

2. Congressional Power

The Constitution does not assign power over foreign policy and national security to the President, but rather creates a system of shared responsibility between the Congress and the President for those matters.

Article I of the Constitution provides the Congress with tremendous power in the area of foreign policy and national security. "The Congress shall have Power to * * * provide for the common defense. * * * [t]o define and punish Piracies and Felonies committed on the high seas, and Offenses against the Law of Nations; [t]o

[73] Youngstown, supra, n.68, p. 635–38.
[74] 453 U.S. 654 (1981), p. 661.
[75] Youngstown, supra, n. 68, p. 635.
[76] Hearing, supra, n. 29, written testimony of Michael Glennon, p. 11.
[77] Youngstown, supra, n. 68 and accompanying text.

declare War, grant letters of Marque and Reprisal, and make Rules concerning captures on Land and Water; [t]o raise and support Armies * * * [t]o provide and maintain a Navy; [t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions * * *." [78] Presidential power to make treaties is "by and with the Advice and Consent of the Senate * * *." [79] Furthermore, Congress has total control over governmental appropriations, without regard to subject matter—"[N]o money shall be drawn from the Treasury, but in consequence of Appropriations made by Law." [80]

Article II provides that the "President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States." * * * "He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors * * *." [81]

The courts have repeatedly stated that foreign policy is a shared responsibility of the Congress and the President. In 1986, the Supreme court recognized the "premier role which both Congress and the Executive play in this field [foreign relations]." [82] Similarly, the Supreme Court indicated in 1948 that foreign policy issues "are wholly confided by our Constitution to the political departments of government, Executive and legislative." [83] This year, the Supreme Court indicated that courts will show deference to the authority of the President in military and national security affairs "unless Congress specifically has provided otherwise * * *." [84]

The distinction the District Court attempts to make in *AFSA* under the separation of powers doctrine between policy and national security issues on the one hand, and domestic policy on the other, is simply not supported in the Constitution. Indeed, in both the *Youngstown* and *Dames & Moore* cases, the Supreme Court was confronted with national security or foreign policy issues. The Supreme Court, however, evaluated Presidential power in light of congressional will in their opinions in those cases and not under a fixed notion of Presidential primacy over foreign policy subject matters.

Turning to the specific issue presented by the moratorium on the nondisclosure agreements—the regulation of Government information—the weakness of the court's opinion in *AFSA* becomes even more evident. The Supreme Court has specifically upheld statutory provisions that regulate and control executive, including national security, information. In *Nixon* v. *Administrator of General Services* [85], the court upheld the Presidential Recordings and Materials

[78] U.S. Constitution, Article I, Section 8.
[79] U.S. Constitution, Article II, Section 2.
[80] U.S. Constitution, Article I, Section 9.
[81] U.S. Constitution, Article II, section 2.
[82] *Japan Whaling Assn.* v. *American Cetacean Society*, 106 S.Ct. 2860, 2866 (1986).
[83] *C&S Airlines* v. *Waterman Corp.*, 333 U.S. 103, 111 (1948).
[84] *Navy* v. *Egan*, 108 S. Ct. 818, 825 (1988).
[85] 433 U.S. 425 (1977).

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6 S.Ct. 2860, 2866 (1986).
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Preservation Act from a separate of powers challenge. The Act controls and regulates President Nixon's own papers.

There are numerous other statutes that regulate information and material in the executive branch, including the Freedom of Information Act,[86] the Central Intelligence Agency Information Act,[87] the Classified Information Procedures Act,[88] and the Intelligence Oversight Act.[89] The District Court's opinion in *AFSA* casts a dark shadow on all these statutes.

The District Court's ruling in AFSA that the moratorium on the nondisclosure agreements is an unconstitutional statute is simply untenable. As Chairman Fascell of the House Foreign Affairs Committee remarked to the subcommittee, "The District Court decision, by cavalierly dismissing Congress' constitutionally mandated powers in foreign and national security policy in favor of a vague, plenary executive power threatens the democratic basic by which that policy is conducted" [90] in our republic. He advocated, along with Professors Bruff and Glennon, that the Supreme Court "reverse the unfortunate decision of the District Court." [91] Congress has the constitutional authority to legislate restrictions and controls on the Administration's nondisclosure agreements.

III. Findings

Based upon the committee's oversight hearings, both in October 1983 and August this year, on the Administration's imposition of nondisclosure agreements on millions of Federal and Federal contractor employees, the committee makes the following findings:

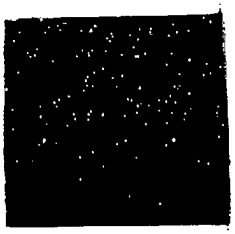
1. The Administration has vastly extended the use of nondisclosure agreements to all employees who have access to classified information—three million current and former Federal employees according to the most recent GAO statistics—without any congressional authorization.

2. The nondisclosure agreements used by the Administration greatly increase employees' lifelong obligations because they cover "classifiable" as well a classified information, and they apply to disclosures made to Members of Congress. In addition, the SCI nondisclosure agreement imposes a lifelong prepublication review censorship requirement.

3. Information that is properly classified under Executive Order 12356 must be marked "classified," which gives employees notice that the informtion is subject to any restrictions that apply to classified information. The nondisclosure agreements used by the Administration apply to information that is not marked "classified," which deprives employees of the notice that is given by such markings.

4. Because the criteria for classifying information are subjective in nature, reasonable minds may differ as to whether a particular document should be classified. Without classification markings or

[86] 50 U.S.C. Sec. 1552(b)1.
[87] 50 U.S.C. Sec. 431-32.
[88] 18 U.S.C. App., Sec. 1 et seq.
[89] 50 U.S.C. Sec. 413-415.
[90] Hearings supra, n. 29, written testimony of Dante Fascell, p. 6-7.
[91] Id.



some other objective notification, employees will not know whether particular information is subject to the nondisclosure agreements.

5. Under the nondisclosure agreements, the Administration can classify information after a Federal employee has disclosed it. In such situations, the employee could be subject to sanctions for such disclosures.

6. The Administration has put forth no evidence that there is a need for nondisclosure agreements to apply to information that is not marked "classified," especially since Executive order 12356 allows the Administration to mark documents "classified" for a 30-day period in which they are awaiting a classification determination.

7. Federal employees are a valuable source of information for Congress about governmental activities, and their disclosure to Members of Congress are extremely important to Congress in carrying out its oversight and lawmaking responsibilities. The requirement that a Federal employee must seek authorization from his or her superiors before making a disclosure of information to Congress deters employees from making such disclosures. In essence, such requirements force the employees to identify themselves as whistleblowers and to alert the agency official that Congress may learn of embarrassing or illegal conduct.

8. The Administration has put forth no evidence of any harm flowing from Federal employees' disclosures to Congress of classified or classifiable information. Nor has the Administration shown that there is a need to restrict such disclosures by a requirement of prior agency approval.

9. In both the Lloyd-LaFollette Act and the whistleblower protections of the Civil Service Reform Act, Congress passed legislation that protects both employees' rights to disclose information to Congress and the public and the need to keep certain information confidential. The nondisclosure agreements violate the standards adopted by Congress in these statutes.

10. The Administration's expansion of the use and terms of nondisclosure agreements threatens to curtail invaluable whistleblower disclosures to both the public and Congress, which in turn will limit the extent and quality of public debate on important public policy issues.

11. The prepublication review requirement contained in the nondisclosure agreements constitutes an unwarranted prior restraint in violation of the First Amendment and poses a serious threat to freedom of speech and national public debate.

12. Given Congress' constitutional role in foreign policy and budget matters and its general lawmaking and oversight responsibilities, it is within Congress' authority to legislate restrictions and controls on nondisclosure agreements.

13. By continuing to use SF 189, SF 4193, and other nondisclosure forms that cover nonclassified information and that require prior authorization for disclosures to Congress after enactment of Section 630 of the Continuing Resolution for Fiscal Year 1988, the Administration was not in compliance with the law. The Administration has also failed to comply with Section 630 not notifying employees who signed noncomplying agreements that the obligations tied to "classifiable" as opposed to classified information and the

limitations on congressional disclosures cannot be enforced during fiscal year 1988.

IV. Conclusions and Recommendations

The committee concludes that the Administration's nondisclosure agreements place unwarranted restrictions on free speech and national political debate and interfere with communications made to Congress in violation of statutory and constitutional law. Therefore, the committee recommends:

1. The Administration should eliminate the use of the word "classifiable" in its nondisclosure agreements and should limit such agreements to information that is marked "classified."
2. The Administration should eliminate the restrictions in its nondisclosure agreements on Federal employees' disclosures to Congress by requirement of prior authorization or otherwise.
3. The Administration should eliminate the prepublication review requirements from the nondisclosure agreements.
4. The Administration should make sure that all individuals who have signed nondisclosure agreements receive actual notice that such agreements apply only to information marked "classified," do not restrict disclosures of information to Congress, and do not require prepublication review.
5. If the Administration does not follow the foregoing recommendations, Congress should legislate standards that ensure that the agreements neither trample on the First Amendment and statutory rights of individuals or impede Congress's access to vital information or curb public debate on important policy matters.

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LEGISLATION NEEDED TO CURB SECRECY CONTRACTS

FIFTY-NINTH REPORT

BY THE

COMMITTEE ON GOVERNMENT OPERATIONS

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